

Trombettas v Ingargiola

2012 NY Slip Op 30358(U)

January 30, 2012

Supreme Court, Nassau County

Docket Number: 1737/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ELIA TROMBETTAS,

Plaintiff,

- against -

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 1737/10
Motion Seq. No.: 03
Motion Date: 01/06/12

D.M INGARGIOLA and MAUREEN INGARGIOLA,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits and Memorandum of Law</u>	1
<u>Affirmation in Opposition and Exhibits</u>	2
<u>Reply Affirmation</u>	3

Defendants move, pursuant to CPLR § 3212, for an order granting them summary judgment dismissing plaintiff's Verified Complaint on the ground that there are no material issues of fact with regard to any alleged negligence against them. Plaintiff opposes the motion.

This action arises out of a motor vehicle accident that occurred on October 25, 2009, at approximately 5:30 p.m., on Ocean Avenue, north of Route 27, Lynbrook, Nassau County, New York. The accident involved two vehicles, a 1999 Mitsubishi convertible owned and operated by plaintiff and a 2008 Nissan owned by defendant Maureen Ingargiola and operated by defendant D.M. Ingargiola. Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about January 9, 2010. Issue was joined on or about March 10, 2010. It

is alleged that plaintiff was in the process of making a left turn over a double yellow line on Ocean Avenue into a parking lot when her vehicle came into contact with defendants' vehicle, which was traveling in the adjacent lane from the opposite direction. Plaintiff claims that when her vehicle made the turn it was ten feet in front of defendants' oncoming vehicle.

Defendants submit that "the Police Accident Report states: 'Vehicle # 1 (Trombettas) while attempting to make a left turn into a private parking lot did strike vehicle #2 (Ingargiola).' As to contributory fault, 'Failure to Yield Right of Way' is assessed against defendant." See Defendants' Affirmation in Support Exhibit D.

Defendants argue that "[i]t is not controverted that plaintiff crossed a double yellow line ten feet in front of plaintiff's oncoming vehicle which was proceeding legally at 20 to 25 miles per hour. Therefore, no material issues of fact exist, and plaintiff cannot demonstrate, as a matter of law, that defendants were in any manner negligent. Plaintiff has the burden of proof to demonstrate that defendants were negligent and that defendant's (*sic*) negligence was a substantial factor in causing the accident." Defendants contend that the only negligence was that of plaintiff.

In opposition to defendants' motion, plaintiff argues that there are issues of material fact regarding how the subject accident occurred. Plaintiff submits that the drivers of both vehicles involved in the accident "offered diametrically different versions of how this accident occurred." Plaintiff adds, "[s]tated differently, both plaintiff and driver-defendant believe that the other entered into their lane for oncoming traffic at the time of the impact. For example, Ms. Trombettas testified that at the time of the impact between the two vehicles, her car was within her lane of travel and stopped on Ocean Avenue. (Trombettas EBT p. 31). This, of course,

facially conflicts with the testimony of the driver-defendant who stated that Ms. Trombettas's (*sic*) vehicle entered into her lane (*i.e.*, on-coming traffic) on Ocean Avenue (Ingargiola EBT p. 32)....Against this backdrop, defendants' contention that the manner in which this accident occurred is 'not controverted' is belied by the testimony of the two parties. There is absolutely no consensus on which vehicle was in the other vehicle's lane on Ocean Avenue at the time (*sic*) impact."

Plaintiff further argues that, "contrary to the assertion of defense counsel - Ms. Trombettas has provided a photograph of the accident location showing that Ocean Avenue, in her direction of travel, *did not have a solid double yellow line* separating the opposite direction of travel." Plaintiff submits a photograph of the location of the accident to demonstrate that, at the location of the accident, there was a left arrow painted on the ground. *See* Plaintiff's Affirmation in Opposition Exhibit C.

Plaintiff also contends that, "even if the defendant-driver's version of the accident were (*sic*) accepted as true, there would still be a reasonable basis to find comparative fault against the defendant driver....the testimony of the defendant-driver provides a reasonable basis to infer that she did not see a vehicle traveling in front of her or was otherwise traveling at a rate of speed in excess to that which was reasonable under the rainy conditions. As the driver-defendant had thirty seconds to bring her vehicle to a stop to avoid the impact and did not, an issue of fact exists as to whether the driver-defendant's operation of her car was a substantial factor in causing the accident."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient

evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v.*

Johnson, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Defendants, in their motion, have demonstrated *prima facie* entitlement to summary judgment. Therefore, the burden shifts to plaintiff to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

It is the existence of an issue, not its relative strength that is the critical and controlling consideration in the determination of a summary judgment motion. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964). Summary judgment is rarely granted in negligence cases. *See Connell v. Buitekant*, 17 A.D.2d 944, 234 N.Y.S.2d 336 (1st Dept. 1962).

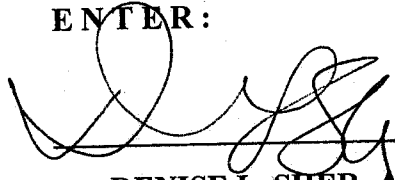
After applying the law to the facts in this case, the Court finds that plaintiff has met her burden and demonstrated issues of fact which preclude summary judgment. As previously stated, in rendering a decision on a summary judgment motion, the Court is not to resolve issues of fact or determine matters of credibility. The Court finds that the facts and circumstances surrounding the motor vehicle accident do indeed involve determining the credibility of the parties involved in said accident. The Court holds that the parties' conflicting versions of the accident raise triable issues of fact.

Therefore, based upon the foregoing, defendants' motion, pursuant to CPLR § 3212, for an order granting them summary judgment dismissing plaintiff's Verified Complaint on the ground that there are no material issues of fact with regard to any alleged negligence against them is hereby **DENIED**.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on February 6, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 30, 2012

ENTERED
FEB 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE